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## GOVERNMENT BY JUDICIARY

*A talk delivered by Philip B. Kurland,\* William R. Kenan, Jr.  
Distinguished Service Professor, The University of Chicago, at The  
Law School of the University of Arkansas at Little Rock, on 20  
April 1979 at 8:00 P.M.*

The phrase that I use for my title, "government by judiciary," is generally regarded as pejorative. The question is why should the words be so readily recognized as deprecatory rather than laudatory, even by those who applaud the fact even as they deny the inference. I think the answer lies in a recognition of the illegitimacy of the broad exercise of judicial power, however much the results are to the tastes of those who applaud the assumption of authority. The reaction of many to the implicit charge contained in the words "government by judiciary" must be similar to that expressed by Professor Louis Lusky in his recently published critique of the work of the Supreme Court in a volume entitled *By What Right?* In his prefatory remarks, he stated:

This has been a very hard book to write. Ever since I became a lawyer I have revered the United States Supreme Court as the finest of our institutions — and I still do. The book was begun as an effort to justify virtually everything the Court has done since its 1937 rebirth as the citadel of American freedom, equality, and justice. As I studied and wrote, however, I found that I could not do what I had planned. Gradually I became convinced that the Court's record of stunning achievement is significantly flawed. In the past few years particularly, the Justices have given serious cause for suspicion that they have come to consider the Court to be above the law. Like a son who is just discovering his father to be less than perfect, I was shaken by the deepening suspicion that my Galahad was a Lancelot.<sup>1</sup>

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1. Preface to L. LUSKY, *BY WHAT RIGHT?* at vii (1975).

*By What Right?* indeed. But the title of my talk properly belongs now to Raoul Berger, who recently published a book by that name and has been excoriated for doing so.<sup>2</sup> Indeed, I should have preferred a different title, but that too has been preempted by Professor Leonard Krieger, whose recent book is called *An Essay on the Theory of Enlightened Despotism*.<sup>3</sup>

My most recently published book is concerned essentially with problems of separation of powers and is entitled *Watergate and the Constitution*. And, I submit, that the issues of Watergate and those of government by judiciary are, at bottom, the same. The late Professor Alexander M. Bickel wrote frequently and well on the subject of judicial power,<sup>4</sup> and thus brought down on his head — and incidentally on my own — the wrath of Judge J. Skelly Wright.<sup>5</sup> (There is no want of defenders of judicial activism.) In his posthumously published volume entitled *The Morality of Consent*,<sup>6</sup> Bickel recognized the parallel between the Watergate episode and the exercise of power by the Supreme Court. He noted that “the Warren Court got over doctrinal difficulties or issues of the allocation of competence among various institutions by asking what it viewed as a decisive practical question: If the Court did not take certain action which was *right* and *good*, would other institutions do so, given political realities?”<sup>7</sup>

Bickel went on:

The derogators of procedure and of technicalities, and other anti-institutional forces who rode high, on the bench as well as off, were the armies of conscience and of ideology. If it is paradoxical that they were also the armies of a new populism it is not a paradox to wonder at . . . . The paradox is that the people whom the populist exalts may well — will frequently — not vote for the results that conscience and ideology dictate. But then one can always hope, or identify the general will with the people despite

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2. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977). See Brest, *Berger v. Brown et al.*, N. Y. Times Book Review, Dec. 11, 1977, at 10, col. 1; Miller, *Do the Founding Fathers Know Best?*, Wash. Post, Nov. 13, 1977, § E, at 5, col. 1. See also Berger, *Government by Judiciary: Some Counter criticism*, 56 Tex. L. Rev. 1125 (1978).

3. (1978).

4. See, e.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1976); A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

5. Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

6. (1975).

7. A. BICKEL, *THE MORALITY OF CONSENT* 120 (1975).

their votes, and let the Supreme Court bespeak the people's general will when the vote comes out wrong.<sup>8</sup>

He then linked the aggressive grasps for power by the Court with similar behavior by the Nixon White House:

Here the connection with the attitudes that at least contributed to Watergate is direct. It was utterly inevitable that such a populist fixation should tend toward the concentration of power in that single institution which has the most immediate link to the largest constituency. Naturally the consequence was a Gaullist presidency, making war, making peace, spending, saving, being secret, being open, doing what is necessary, and needing no excuse for aggregating power to itself besides the excuse that it could do more effectively what other institutions, particularly Congress, did not do very rapidly or very well, or under particular political circumstances could not do at all. This was a leaf from the Warren Court's book, but the presidency could undertake to act anti-institutionally in this fashion with more justification because, unlike the Court, it could claim not only a constituency but the largest one.<sup>9</sup>

The constitutional limits of judicial power — like the constitutional limits of executive power — are not easily defined. From the very beginning of judicial review, we have been told by our most eminent jurists that the Constitution is a very different kind of instrument from all others that are intended to govern people's conduct. A written constitution is plainly a contract, but not merely a contract; it is a law, but not merely a law. A constitution purports to allocate and to limit; it restrains governmental powers. All exercise of governmental power depends on constitutional legitimation. And so, according to these eminent authorities, the Constitution must be read neither literally, nor merely in light of the intention of its authors, nor only in terms of extending its meaning to inhibition of evils of the same kind that it patently purports to abate. For the jurist and the jurisprudent the question tends to become: what would I put in the Constitution if I were writing it today?

The judicial language that justifies the expansion of its own powers from that of a court to that of an amendatory body, a Council of Revision which the framers specifically rejected,<sup>10</sup> is familiar. Thus, in *Marbury v. Madison*, the great Chief Justice told us: "It

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8. *Id.* at 121.

9. *Id.* at 121-22.

10. See 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 72-80 (rev. ed. 1937).

is emphatically the province and duty of the judicial department to say what the law is."<sup>11</sup> But at the very same time, Marshall said that "the framers of the Constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature."<sup>12</sup> The first quotation, of course, is more familiar than the second, because it is so frequently invoked by the courts while the latter is ignored.

It was just a little later that Marshall asserted: "[W]e must never forget . . . it is a *constitution* we are expounding,"<sup>13</sup> and thus transmuted the Necessary and Proper Clause of Article I into a Hamiltonian grant of unlimited authority to the national government. Felix Frankfurter, near the end of his judicial career, asserted that this statement by Marshall was "the single most important utterance in the literature of constitutional law — most important because most comprehensive and most comprehending."<sup>14</sup> I suppose that my apprenticeship to Justice Frankfurter was a failure. For these words, "we must never forget it is a *constitution* we are expounding," are as empty of meaning for me as they were full of significance for Mr. Justice Frankfurter, unless these words mean what Charles Evans Hughes meant when he said: "The Constitution is what the Justices say it is."<sup>15</sup> That is all to the good by way of description if not by way of legitimation. But even Hughes added "while careful to maintain its authority as the interpreter of the Constitution, the Court has not sought to aggrandize itself at the expense of either executive or legislature,"<sup>16</sup> which was neither true nor explanatory.

Mr. Justice Holmes, perhaps Marshall's only rival for the claim of being the greatest Supreme Court Justice by that amorphous but pervasive measure of ignorant public opinion, told us, even as he too stretched the Constitution beyond recognition:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a

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11. 5 U.S. (1 Cranch) 137, 177 (1803).

12. *Id.* at 179-80.

13. *M'Culloch v. Maryland*, 14 U.S. (4 Wheat.) 316, 407 (1819).

14. KURLAND, ED., *FELIX FRANKFURTER ON THE SUPREME COURT* 534 (1970).

15. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 41 (1928).

16. *Id.*

nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>17</sup>

My, he had a way with words. He made them sound as if they were full of insight and subtle but controlling truths. But what did Holmes mean by these words, except that judges will rewrite the fundamental document to meet what we think are the exigencies of our time? On the other hand, he also reminded us:

While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise, a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*.<sup>18</sup>

Of course, the framers of the Constitution were not unaware that times would change and so, too, therefore, would the demands on the Constitution. That is why they made provision for interstitial changes, not by the courts but by the legislature. It was to Congress — not the national government as a whole or any branch of it — that the Constitution looked in the Necessary and Proper Clause, which reads:

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.<sup>19</sup>

The language of the Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments all charge the Congress, not the courts, with effectuation of their respective provisions. The Constitution itself also specified the means for more fundamental changes by its provisions for constitutional amendments contained in Article V. Again, not by the courts, but by "We the People of the United States," that is, by the only sovereign

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17. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

18. *Otis v. Parker*, 187 U.S. 606, 608-09 (1903).

19. U.S. CONST. art. I, § 8, cl. 18.

recognized by the Constitution. The authors of the basic document had not yet forgotten that the American Revolution was a political revolution intended to displace the sovereign crown, his courtiers, and his judges, too, as the rulers of the nation: to replace them by a democratic system in which the people were to determine who shall have what powers of government. Instead, we have come to the point where the royal fiat has been replaced by the equally arbitrary fiat of courts and the bureaucracies.

The two patent questions are, what is the justification for the courts assuming the role of constitution makers and whence they derive their revisions of the Constitution. The prime argument for endowing the Court with this power of constitution making is that of necessity. But with Judge Learned Hand I submit this justification is valid only with regard to the First Amendment. He felt that the strongest argument for judicial review related to freedom of speech, where the judicial branch may be in a position to act quickly and contrary to majority desires:

The most important issues here arise when a majority of the voters are hostile, often bitterly hostile, to the dissidents against whom the statute is directed; and legislatures are more likely than courts to repress what ought to be free. It is true that the periods of passion or panic are ordinarily not very long, and that they are usually succeeded by a serener and more tolerant temper; but . . . serious damage may have been done that cannot be undone, and no restitution is ordinarily possible for the individuals who have suffered. This is a substantial and important advantage of wide judicial review.<sup>20</sup>

The arguments for judicial supremacy in other areas are less cogent. As Hand said:

Judges are perhaps more apt than legislators to take a long view, but that varies so much with the individual that generalization is hazardous. We are faced with the ever present problem in all popular government: how far the will of immediate majorities should prevail. . . . [J]udges are seldom content [however] merely to annul the particular solution before them; they do not, indeed, they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as "arbitrary," "artificial," "normal," "reasonable," "inherent," "fundamental," or "essential," whose office usually, though quite innocently, is to disguise what they are doing and

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20. L. HAND, *THE BILL OF RIGHTS* 69 (1958).

impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision. If we do need a third chamber it should appear for what it is, and not as the interpreter of inscrutable principles.<sup>21</sup>

"Aye, there's the rub."<sup>22</sup> The reason that "government by judiciary" sounds in the pejorative is because it contradicts the judiciary's representation about itself. "Upon what meat doth this our Caesar feed, That he is grown so great?"<sup>23</sup> Where, if not in the words of the constitution, if not in the original intent of the framers, if not in precedent, if not in reason adequate to explain its conclusions, does the Court find the makings of its revisions?

Many judges have acknowledged that with them judgment precedes the reasons for their judgment. Having reached their conclusions, they then seek to justify them. But on what grounds? We have a new emergence of notions of natural law, a higher law than the Constitution, which the courts, like Vestal Virgins, assure us to be the Truth. The demand for reason rather than insight is rejected, as William James would have rejected it, as "The Sentiment of Rationality."<sup>24</sup>

If judges do not seek to rationalize their conclusions until after they have rendered them, why the gross waste of effort in affording fictive justifications? If the judgment comes with the help of reasoning, can there be a purpose in providing the reasoning? William James quotes from a Professor Bain — whose name, it must be admitted has not gone down among the major scientists of our time: "Our only error is in proposing to give any reason or justification for the postulate, or to treat it as otherwise than begged at the outset."<sup>25</sup>

Speaking of the world of science in words familiar to the world of law, James himself wrote:

The coil is about us, struggle as we may. The only escape from faith is mental nullity. What we enjoy in a Huxley or a Clifford is not the professor with his learning, but the human personality ready to go in for what it feels to be right, in spite of all appearances. The concrete man has but one interest, — to be right. That for him is the art of all arts, and all means are fair which help him to it. Naked he is flung into the world, and between him and nature there are no rules of civilized warfare. The rules of the scientific

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21. *Id.* at 69-70.

22. W. SHAKESPEARE, *HAMLET* III:1:65 (G.L. Kittredge and I. Ribkin, eds. 1971).

23. W. SHAKESPEARE, *JULIUS CAESAR* I:2:149-50 (G.L. Kittredge and I. Ribkin, eds. 1971).

24. *THE WRITINGS OF WILLIAM JAMES* 317 (McDermott, ed., 1978).

25. *Id.* at 334.



game, burdens of proof, presumptions, *experimenta crucis*, complete inductions, and the like, are only binding on those who enter that game. As a matter of fact we all more or less do enter it, because it helps us to our end. But if the means presume to frustrate the end and call us cheats for being right in advance of their slow aid, by guesswork or by hook or crook what shall we say of them? . . .

In short, if I am born with such a superior general reaction to evidence that I can guess right and act accordingly, and gain all that comes of right action, while my less gifted neighbor (paralyzed by his scruples and waiting for more evidence which he dares not anticipate, much as he longs to) still stands shivering on the brink, by what law shall I be forbidden to reap the advantages of my superior sensitiveness?<sup>26</sup>

There are questions to ask of those who behave as pragmatically as James suggested they should, when they are behaving as judges. Can they all be such geniuses as William James supposed himself to be? Does the presidential appointment with the advice and consent of the Senate certify to that condition? Or is this simply an arrogation to oneself, a display of naked power, implicitly granted by the President's nomination and the Senate's confirmation?

One might think that the rejection of reason is simply a reflection of our contemporary *zeitgeist*. Surely we have enough contemporary philosophers who tell us that reason is a myth and feeling, emotional not tactile, is the only guide to truth. But again the question becomes, why pretend? I submit that for a court to pretend that it is only a medium through which the spirit of the laws convey their meaning demeans both expositor and auditor. Yet, despite the teachings of the jurisprudential realists, courts continue to adhere to the proposition that the mandates they hand down are not theirs but come from higher authority.

These representations become less and less credible as the reasoning from the language of the allegedly controlling document — whether Constitution or statute or judicial precedent — becomes more and more attenuated. None today believes that Apollo communicated to the Greeks through the Delphic oracles. So, too, is it generally recognized that courts — whatever they say — are more of the school of Humpty Dumpty in *Through the Looking Glass*, making words mean what they want them to mean; that the courts are the masters and not the servants of the words they purport to invoke as guides to judgment.

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26. *Id.* at 335.

What then does it mean to speak of judicial adventure beyond its defined ken? On that subject I have promised — or threatened — a book, which I have already entitled “The Reign of Error.” Today I would merely adumbrate a small portion of what I will spell out later. Let me catalogue a few of the symptoms of the disease of judicial government.

The primary symptom is revealed not only by recent judicial behavior but by that which has occurred in earlier periods about which there is no question now but that the courts exceeded their province. It is the one to which I have already adverted. It is the abuse of power of judicial review, with a resulting subordination of the other branches of government, state and federal, legislative and executive.

These periods of judicial activism are marked by the substitution of ideology for constitutional language and history, and of shibboleths for reasons. I think that we now recognize that the invocation of the Due Process Clause of the Fourteenth Amendment by the Nine Old Men was an excuse rather than a reason for social legislation of the 1920s and 1930s. “Freedom of contract” was a phrase added to the Constitution, not derived from it, to create the ideology of substantive due process. So, too, must we recognize that the invocation of the First Amendment and the Equal Protection Clause — and especially what is called their “penumbras” — has served the same purpose for contemporary courts as the Due Process Clause did for the earlier period. And phrases such as “the right to travel,” “chilling effects,” “fundamental rights” are, like “freedom of contract,” labels stating conclusions rather than reasons for these conclusions.

The primary difference between the activism that was decried by Louis Boudin in his book, also entitled *Government by Judiciary*,<sup>27</sup> and Robert H. Jackson, in his book *The Struggle for Judicial Supremacy*,<sup>28</sup> on the one hand, and the activism of today, on the other, is that the courts of the earlier period acted only to forestall governmental action, while the new judicial authority encompasses commands for government action.

This shift from the negative to the positive is not a small difference. For we are gradually reaching the point, as a result, where whatever it is that the Constitution does not forbid is being held to be constitutionally compelled. There is a diminishing area both for the citizen and for the other branches of government in which they

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27. (1932).

28. (1941).

are free to operate without judicial mandate.

Both the earlier courts and the present ones are acting on behalf of a particular clientele, largely self-selected by the judges. It may be said of both, what Harlan Fiske Stone said of the earlier courts in the 1930s:

[T]he experience of the past one hundred and fifty years has revealed the danger that, through judicial interpretation, the constitutional device for the protection of minorities from oppressive majority action, may be made the means by which the majority is subjected to the tyranny of the minority. It was the lasting contribution of Justice Holmes that he saw clearly that the danger arose, not from the want of appropriate formulas for the exercise of the judicial function, but from the judicial distrust of the democratic process, and from the innate tendency of the human mind to apply subjective rather than objective tests to the reasonableness of legislative action.<sup>29</sup>

Still another symptom of judicial government was described by Stone when he wrote that "the Court's setting aside of the plain command of Congress, without reference to any identifiable prohibition of the Constitution, and with only the support of platitudinous irrelevancies is a matter of transcendental importance."<sup>30</sup> The huge number of recent opinions that can be described as justified only by "platitudinous irrelevancies" affords an index of judicial expansiveness.

The essential justification for this kind of judicial legislation cannot be found in the words of the Constitution. They may be found, however, in such words as those of the late Alexander Meiklejohn, when he wrote:

[L]ike most revolutionaries, the Framers could not foresee the specific issues which would arise as their "novel idea" exercised its domination over the governing activities of a rapidly developing nation in a rapidly and fundamentally changing world. In that sense, the Framers did not know what they were doing. And in the same sense, it is still true that, after two centuries of experience, we do not know what they were doing, or what we ourselves are doing.<sup>31</sup>

Meiklejohn seems to be invoking the Christian spirit in defense of the courts: "Father, forgive them; for they know not what they do."<sup>32</sup>

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29. Quoted in A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 331 (1956).

30. *Id.* at 421.

31. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUPREME COURT REVIEW 245, 264.

32. Luke 23:34 (King James).

Let me invoke an authority whose thoughts and efforts cannot be labelled as J. Skelly Wright once labelled Alex Bickel's and mine.<sup>33</sup> Archibald Cox is certainly as stalwart a defender of the judiciary's expansive functions as may be found among respectable constitutionalists. Yet, this is what he had to say in his Chicle Lectures at Oxford in 1975:

Has the Judicial Branch overexpanded its role in American government and overpoliticized the process of constitutional adjudication? Nearly all the rules of constitutional law written by the Warren Court relative to individual and political liberty, equality, and criminal justice, impress me as wiser and fairer than the rules they replace. I would support nearly all as important reforms if proposed in a legislative chamber or a constitutional convention. In appraising them as judicial rulings, however, I find it necessary to ask whether an excessive price was paid by enlarging the sphere and changing the nature of constitutional adjudication. The changes made in governmental institutions today may affect the results tomorrow by reducing the effectiveness of the institutions and the justice of their determinations. . . .

Two institutional worries result from recent activism in constitutional adjudication. First, there is the concern that the Court may sacrifice the power of legitimacy that attaches to decisions within the traditional judicial sphere rendered on the basis of conventional legal criteria, and so may disable itself from performing the narrower but none the less vital constitutional role that all assign to it. Second, there is the fear that excessive reliance upon courts instead of self-government through democratic processes may deaden a people's sense of moral and political responsibility for their own future, especially in matters of liberty, and may stunt the growth of political capacity that results from the exercise of the ultimate power of decision.<sup>34</sup>

A part of the disease of judicial government is also to be recognized by the principal method by which the legislative will is frustrated by the judiciary. This has been largely accomplished in periods of judicial expansionism by reversing, explicitly or implicitly, the presumption of validity of legislative action. By presuming invalidity where government action threatens to impinge on their clients' interests, the courts make defense of the legislative act all but impossible. Instead of requiring a demonstration that the legislature has overreached its constitutional limits, the burden is put on the legislature, not only to show that the acts it has indulged are

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33. Wright, *supra* note 5.

34. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 102-03 (1976).

constitutional, but that they are more constitutional than any of the possible alternatives available to them.

The label "suspect classification" — applicable only where the courts choose to make it applicable — is a determinant of a result and not the reason for reaching it. It may be that requiring proof of validity of the exercise of national power would be in keeping with the original concept of the national government as a government of limited powers. But such a rationale cannot suffice to justify the reversal of the presumption of validity with regard to state government. Yet it is more often the latter rather than the former that fall subject to judicial whippings.

Still another mark of judicial hegemony can be quickly noticed here. It is the reduction of the constitutional requirement of case and controversy as a condition for admission to the federal courts. We have almost arrived at the point that anybody can sue anyone for anything. The growth of standing for parties without interests, if not disinterested parties, is always patent at times of judicial expansionism. I would refer you to Mr. Justice Brandeis's classic concurrence in *Ashwander v. Tennessee Valley Authority*<sup>35</sup> for an attempt to bring courts back to their proper business in 1936. The most egregious form that this invasion of the legislative province takes is the friendly lawsuit, wherein a plaintiff sues a defendant in order to lay down rules that will bind third persons not parties to the action. An example of recent moment may be found in the suit by NAACP and others against HEW in order to have regulations issued which will bind those whom either NAACP or HEW will have occasion to sue in the future, in this case the colleges and universities of southern states. Like many friendly suits, this one ended in a consent decree adversely affecting none but the absent victims. The decree provided for regulations sanctioned by the court but without legislative provenance whatsoever. Whether the recently filed Sears suit will be equally effective to this end remains to be seen.

Two more of the marks of judicial imperialism and I am done for the nonce. The first is the expansive growth of the injunction as the essential means for judicial government. Again the indicia are not merely of contemporary origin. The trail from *In re Debs*<sup>36</sup> in 1895 is a very long one. The specific use of the injunction against labor organizations was ultimately restrained — if not always suc-

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35. 297 U.S. 288, 341-56 (1936).

36. 158 U.S. 564 (1895).

cessfully — by removing federal jurisdiction to undertake such injunctions. But the injunction remains the primary means for a court to substitute itself for a legislature in creating new laws. Thus, what was written in 1922 remains true today: "For the moment we know of no more pressing need for the country's wellbeing than the restoration of confidence in our courts and respect for law through the abandonment of the abuses of the injunction."<sup>37</sup> The injunction is consistently used today as it was a half century ago to prevent the legislative will from being effected until the courts are satisfied that the legislation meets with judicial approbation, *i.e.*, that it aids, or at least does not harm, the judicial clientele.

The final symbol of judicial government that I shall mention here is the utilization of judicial discretion as a justification for judicial action. In 1949, Felix Frankfurter wrote of the Supreme Court: "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."<sup>38</sup> He was probably inaccurate in his description then; his proposition is certainly inappropriate now. By resort to the measure of the Chancellor's foot, the courts do in fact act like kadis, although they sit in more regal chambers than the foot of a tree would afford.

In their resort to judicial discretion as the standard for judgment, the courts are essentially rejecting the essence of the rule of law. The rule of law contemplates that the same standards of conduct will be applied to all persons who come before it. That is what "equal justice under law," carved in stone over the entrance to the marble palace, once purported to mean. But the invocation of judicial discretion is a resort to *ad hoc* rules applicable only to the instant case before the court and nowhere else. It is simply an excuse for affording no justification for a court's behavior except that the court willed it so.

There are other stigmata of judicial overreaching for power. But suffice it here to say that I do not regard the expansiveness of judicial power to be due solely to the imperial whims of the judiciary. The craving of the public to take every disagreement to litigation is limited only by the cost of that litigation. Where the costs are nominal or nonexistent, you may well expect that very large numbers of persons are willing to make the investment. The increased authority of the judiciary is a direct response to the requests of a new line of consumers for the judicial product.

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37. KURLAND, *supra* note 14 at 108.

38. *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949).

Moreover, for many years — since the arrival of the service state that brought an end to the Nine Old Men — it has been part of the Congressional creed that if you throw enough money at any given social problem, it will go away. Experience has taught us that the recalcitrance of social problems is not so easily reduced. But the methodology has not been abandoned. Instead, Congress has added to its remedial armory, by assuming that these insoluble problems should be addressed by throwing them at the courts for resolution. Alas, the courts are no more capable of resolving most of them than was the United States Treasury. The infallibility of the judiciary in the eyes of Congress, however, remains untarnished.

We may hope that, before it is too late, the courts will abandon their function as the rulers and administrators of society and return to their duties as resolvers of disputes and moderators of the excesses of the other branches of government. The concept of judicial government in a democracy is bound to fail. It will fail for many reasons.

It will fail, even as its most ardent proponents have recognized, because the judiciary has neither the resources nor the talents necessary to impose its will on society. It will fail because its appeal is not to the rule of law but to idiosyncratic preferences that are anything but universal. The courts will fail their legislative function even as they are now failing their judicial function. Expending their time on the creation of ever more new rules for society's governance, they have less and less time to resolve the disputes to which the rules are to be applied. Controversies between citizen and citizen, person and person, are now being relegated, first to "peoples' courts," where neither legal rules nor legal personnel have any role, and second to compulsory arbitration. In both these places, the essential and constitutional concept of procedural due process is an anomaly.

Nor is the judicial burden likely to be dispelled by adding new judges to the bench. They will afford only a temporary respite. For, in our litigious society, the court traffic, like that of our cities' super-highways, will grow faster than the means for handling it can be supplied.

Government by judiciary will fail for a more basic reason. Its success will mean failure, a failure akin to those suffered by the other branches of government. Government by judiciary will fail even as it succeeds, because its present success not only exalts autocracy over democracy, it exalts faction over society, equality over liberty, the mass and the class over the individual, and even mindlessness over reason. All that makes democracy the preferred form

of government — if only in its ideal — is put at hazard by judicial government. And so, if it succeeds, it will fail, however gloriously, certainly tragically.

I say that the concept of government by judiciary will fail tragically. And for this, I would invoke my colleague Professor James Redfield's arguments about "the tragedy of Hector."<sup>39</sup> Redfield could have been speaking of the federal judiciary when he wrote of Hector:

Hector has been overtaken by the disease diagnosed by Thucydides: "Hope and desire, one pushing and the other pulling . . . do the greatest harm . . . And chance also counsels them to [take] . . . risks with inferior resources . . . Each man, supported by the rest, has an exaggerated opinion of himself."<sup>40</sup>

Therein lies the disease.

Herein lies the tragedy:

The tragic hero does not engage our affections merely because his needs outrun his resources, or his problems their solutions. The hero's drama is, at least in part, internal to himself, and his failure is a failure of self-knowledge and self-definition. Our pity and terror are evoked partly by the realization that virtue can be inadequate to circumstance, but they are evoked much more deeply by the realization that virtue itself is not immune to circumstance, that in action it can turn to vice. . . . The dilemmas of the hero are enactments of the contradictory cultural setting in which he finds himself. In our most abstract description of it, we can describe Hector's error as an enactment of the contradiction between the two heroisms: altruistic and egotistic.<sup>41</sup>

To say that government by judiciary will fail calls for no exultation, even by those who deplore it, because there is no way of knowing what will succeed it. The last time the judiciary was forced to retreat, in 1937, we were left with the seeds of the imperial presidency.<sup>42</sup> This time the bureaucracy, without legislative, presidential, or judicial oversight, may well be the "rough beast" whose "hour has come round at last." But if so, it will be because the judiciary has abandoned the role assigned to it by the Constitution, the role of the vital "centre," which must "hold" if we are to have a free society. Alas, we have lost what Learned Hand referred to as the spirit of moderation which is the essence of such a free society.<sup>43</sup>

39. REDFIELD, *NATURE AND CULTURE IN THE ILLIAD: THE TRAGEDY OF HECTOR* (1975).

40. *Id.* at 152.

41. *Id.* at 153-54.

42. See P. KURLAND, *WATERGATE AND THE CONSTITUTION* (1978).

43. L. HAND, *THE SPIRIT OF LIBERTY*, 164 (Phoenix ed. 1977).



Perhaps had I been kind to you and to myself, I should have avoided saying all that I have said and read to you instead a single paragraph from Edward H. Levi's recent Herman Phleger Lecture at Stanford. He opened his talk this way:

This is a time of churning of ideas in and about the law. Events test the balance among institutions and values. The churning is helped by the tendency of basic concepts and propositions in the law to expand at the expense of others — given half a chance. The changing reach of the law is part of this picture. The grasp of government, therefore of law, is more extensive. The judicial system has increased its sovereignty. We are in a time which might be called the courtification of America. Lawyers, always important in our history, have become more so. As Judge Friendly has written, "members of the bar are attracted to judicial review with a fervor reminiscent of goats in rut." Perhaps in reaction to a loss of faith, a new assertion of moral rights, has emerged. The assertion of moral rights is perhaps also a sign of the responsiveness of our institutions to ward off what Alexander Bickel termed "a politics of moral attack," even though the assertion was part of that politics. In any event, this not surprising echo of a natural law theme was preceded by, and has been accompanied by, the increasing influence of judicial determinations of fairness imposed on relationships and used as governing device over institutions. These tendencies are not new. But they are enlarged.<sup>44</sup>

Let me end on a lighter note, with a quotation of an old saw from a letter by Dean Acheson to a United States Senator:

I saw you were in town briefly to hear about the President's travel plans and that you said he would be accompanied by our prayers. I am willing to join in your statement on the ground that I feel about the future of the United States whenever the President starts out on his travels the way the Marshal of the Supreme Court does when he opens a session of that Court. You will recall he ends up his liturgy by saying: "God save the United States for the Court is now sitting."<sup>45</sup>

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44. E. LEVI, *THE USE OF DISCRETION IN THE LEGAL SYSTEM* 9 (1978).

45. D. ACHESON, *GRAPES FROM THORNS* 66-67 (1972).